United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 74-2384

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74-2384 & 75-4001

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent,

and

J. R. STEVENSON CORP.,

Intervenor.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

JOHN D. BURGOYNE,
GRANT E. MORRIS,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

AUTHORITIES CITED

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74-2384 & 75-4001

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondent,

and

J. R. STEVENSON CORP.,

Intervenor.

On Application for Enforcement of an Order of The National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(6) of the Act by causing the Company to pay money for services not performed and not to be performed.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 *et seq.*), for enforcement of its order issued on August 22, 1974, against Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "Union"). The Board's Decision and Order (A. 11)[1] was issued by a panel consisting of Chairman Miller and Members Kennedy and Penello and is reported at 212 NLRB No. 145. This court has jurisdiction over the proceedings, the unfair labor practice having occurred at White Plains, New York.

I. THE BOARD'S FINDING OF FACT

Briefly, the Board found that the Union violated Section 8(b)(6) of the Act by causing the J.R. Stevenson Corp. (hereinafter the "Company") to pay money to Arpad Korchma who neither performed nor offered to perform services for the Company. The relevant evidence upon which these findings are based is summarized below.

A. Background; the Company hires Union Shop Stewards Toran and Korchma who perform no services for the Company

The Company is a general contractor and is engaged in the construction of a courthouse complex located in White Plains, New York (A. 11; 51). On March 19, 1970, construction on the project began with an

---

[1] "A." references are to the portions of the record printed as an appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

expected completion date of December 31, 1973 (A. 11; 85, 51). The Company and the Union initially entered into a contract covering the period of May-June 1970. This agreement was supplemented by a second contract which extended the contract from July 1, 1970 to June 30, 1973 (A. 12; 51-52, 80-81). Article XIX of the contract provides in part (A. 12; 32):

> 2. On outside construction job sites, the employer shall supply a heated trailer with telephone for employees covered hereby.
>
> 3. A shop steward shall be assigned each supply yard and each road – and building-construction job site at all times, and shall be furnished with vehicle for means of transportation. If an employer has more than one such job site in operation, a shop steward may cover all of such job sites.

After execution of the agreement, the Company hired Victor Toran as a shop steward and, in accordance with the terms of the Union contract, supplied him with a heated trailer and a telephone. Toran's term of employment began in May 1970 and lasted until January 1972 when he retired (A. 12-13; 139, 144-146, 165, 236). Toran neither performed, nor offered to perform, any services for the Company. The great majority of his time was spent sitting in the heated trailer that the Company had supplied (A. 12; 76-77, 89). A portion of Toran's working day was spent making telephone calls to the Union or checking the truck drivers' Union membership cards (A. 12; 89-90, 92-93). The purpose of the telephone calls to the Union was to inform the Union that Toran was "on the job" and to report those truck drivers who were not members of the Union (A. 166-167).

On one occasion Toran was asked to drive a truck for the Company, but he refused unless the Company agreed to hire another teamster to replace him. The subject was not pursued (A. 12; 76, 90-91).

Upon his retirement, Victor Toran was replaced by Arpad Korchma. The Company furnished Korchma with the same heated trailer and telephone that it had supplied Toran (A. 12; 91, 144, 216). Korchma, like Toran, also spent the vast majority of his time simply waiting in the trailer. A small percentage of his time at work was spent checking union cards, walking around, and calling the Union (A. 13; 91-93, 98-99, 214-215). Korchma received approximately $20,000 from the Company in the year 1972 (A. 12; 207). The Company also paid approximately $100.00 per month for the telephone used by Korchma (A. 13; 74).

B. The Company discharges Korchma; the Union causes the Company to rehire Korchma

The Union notified the Company by letter on April 9, 1973, that it desired to terminate the contractual agreement which was due to expire on June 30, 1973, and requested negotiations for a new agreement (A. 13; 34). In response, on June 27, 1973, Vincent Jovene, secretary-treasurer of the Company, stated in a letter to the Union that the Company did "not employ teamsters in any of [its] operations nor [did it] have a need to employ such labor," and, therefore, the Company did not "need to enter into negotiation for a new contract" (A. 13; 35).

On June 29, the Company notified Korchma that his employment would be terminated on the following day when the contract expired (A. 13; 59, 127). Korchma refused to accept his termination pay and thereafter picketed the Company for four days. As a result, the Company agreed to enter into a new collective bargaining agreement with

the Union which was signed on July 9 (A. 13, 38, 62, 108, 127-128, 197, 219). Korchma was rehired by the Company on July 10. The new contract provided Korchma with a minimum payment of $65.00 per day with 50 cents per hour increases which would become effective on July 1, 1974, and July 1, 1975 (A. 13; 38). The contract again contained a provision requiring the Company to supply the shop steward with a heated trailer and telephone (*Id.*).

From the time he was rehired on July 10, Korchma performed no productive services for the Company (A. 13; 63, 129). Korchma was never instructed by the Company to perform any work, nor did he ever ask if there were any tasks he could perform (223-224).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, found that the Union violated Section 8 (b)(6) of the Act by causing the Company to pay money to Arpad Korchma who neither performed, nor offered to perform, services for the Company (A. 21)

The Board's order requires the Union to cease and desist from the unfair labor practice found. Affirmatively, the order requires the Union to reimburse the Company, with interest at 6 percent, for all wages paid to, and expenditures incurred by, Korchma during his employment commencing July 1, 1973, and to post appropriate notices (A. 21-22).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(6) OF THE ACT BY CAUSING THE COMPANY TO PAY MONEY FOR SERVICES NOT PERFORMED AND NOT TO BE PERFORMED

1. Section 8(b)(6) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents:

> to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

This Section of the Act is colloquially referred to as the "featherbedding" Section.[2]

In *American Newspaper Publishers v. N.L.R.B.*, 345 U.S. 100 (1953), and the companion case of *N.L.R.B. v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953), the Supreme Court analyzed the Section and its legislative history. *American Newspaper* concerned the practice in the newspaper industry of the setting of so-called "bogus" type. Under this "wasteful

---

[2] The practice of "featherbedding" has been described as

> "[u]nion efforts to maintain or increase members' wage incomes and employment opportunities by imposing a variety of make-work rules and policies on employee units . . . " Simler, "The Economics of Featherbedding," 16 Ind. & Lab. Rel. Rev. 111 (1962).

The term featherbedding, however, "is used indiscriminately to describe a multitude of activities that are said to prevent the use of more efficient methods or to secure the employment of useless and unnecessary labor." Kaiser, The Folklore of Featherbedding, 3 De Paul L. Rev. 169 (1954). For a history of featherbedding practices, see Teller, The Law Governing Labor Disputes and Collective Bargaining §89 (1940); W. Zelermyer, The Process of Legal Reasoning 58 (1963).

procedure," printers set and later destroyed – without ever using – duplicate type for newspaper advertisements which had been set elsewhere. 345 U.S. at 103-104. *Gamble Enterprises* involved a union's demand for the employment of a "pit" orchestra to play certain pieces whenever a "traveling" orchestra played at the employer's establishment. The "pit" orchestra was neither needed nor desired by the employer. 345 U.S. at 120-121.

Neither activity, the Court held, was covered by Section 8(b)(6). The legislative history of the statutory provision, the Court pointed out, indicated that (345 U.S. at 106):

> However desirable the elimination of all industrial featherbedding practices may have appeared to Congress . . . when the legislation was put in final form Congress decided to limit the practice but little by law.

Thus, the Court noted Senator Taft's statement that the Conference Committee rejected the much more elaborate provisions of the House Bill dealing with the subject because (93 Cong. Rec. 6441 (1947), quoted at 345 U.S. at 108-109):

> while not approving of feather-bedding practices, [the Senate conferees] felt that it was impractical to give to a board or a court the power to say that so many men are all right, and so many men are too many . . . . However, we did accept one provision which makes it an unlawful labor practice for a union to accept money for people who do not work. That seemed to be a fairly clear case, easy to determine, and we accepted that additional unfair labor practice on the part of unions, which was not in the Senate bill.

Accordingly the Court concluded that (345 U.S. at 110):

> The Act now limits its condemnation to instances where a labor organization or its agents exact pay from an employer in return for services not performed or not to be

> performed. Thus, where work is done by an employee, with the employer's consent, a labor organization's demand that the employee be compensated for time spent in doing the disputed work does not become an unfair labor practice. The transaction simply does not fall within the kind of featherbedding defined in the statute. In the absence of proof to the contrary, the employee's compensation reflects his entire relationship with his employer.

Applying this principle to the facts in the cases before it, the Court held that, despite the fact that the work involved was wasteful and unnecessary, the Act had not been violated because in each instance the union either sought "payment only for work which actually was done by employees," 345 U.S. at 105, or sought "actual employment for its members and not mere 'stand-by' pay," 345 U.S. at 123. The Court, however, cautioned in the *Gamble Enterprises* case that (345 U.S. at 123-124):

> We are not dealing here with offers of mere "token" or nominal services. The proposals before us were appropriately treated by the Board as offers in good faith of substantial performances by competent musicians. There is no reason to think that sham can be substituted for substance under §8(b)(6) any more than under any other statute. Payments for "standing-by," or for the substantial equivalent of "standing-by," are not payments for services performed, but when an employer receives a bona fide offer of competent performance of relevant services, it remains for the employer, through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done.

2. In the present case, the facts, *supra*, pp. 3-5, show that the Company in 1970 signed a contract with the Union and thereafter hired Shop Steward Toran. In 1972 Toran retired and was replaced by Shop Steward Korchma. The following year the Company sought to cancel its contract with the Union and terminate Korchma. However, Korchma

began to picket the Company and as a result the Company signed another contract with the Union and rehired Korchma. The Board found that here, unlike the *American Newspaper* and *Gamble Enterprises* cases, the Union's demand in 1973 for the renewal of its contract and the rehire of Korchma was violative of Section 8(b)(6) because "all parties – including [the Union] – knew perfectly well that Korchma simply performed no work – made work or otherwise – for [the Company]" (A. 20).

The Board's finding is amply supported. The evidence, *supra*, pp. 3-4, indicates that Shop Steward Toran, Korchma's predecessor, during the entire period of his "employment" with the Company spent his days sitting in a heated Company trailer and using a telephone provided by the Company at the Company's expense.[3] His only "work" consisted of checking the Union membership status of truckdrivers at the job site and reporting this information to the Union on the Company-supplied telephone. Plainly, his endeavors were, if anything, solely on behalf of the Union and in no sense could he be said to be rendering a "competent performance of relevant services," *Gamble Enterprises, supra*, to the Company. On the single occasion in which Toran was asked by the Company to perform a truck-driving service for the Company, he flatly refused and was never asked to do so again.[4]

---

[3] The Board credited the testimony of the Company's witnesses, Jovene (secretary-treasurer), Knesich, (general supervisor), Bostick, (project superintendent), and Biordi (project manager), over that of Toran in regards to what work, if any, Toran performed (A. 4, 5, 6, 12, 14-15). This Court has long held that "questions of credibility are for the [Administrative Law Judge] and the Board." *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 207 (C.A. 2, 1966). Accord: *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 136 (C.A. 2, 1968); *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2, 1965).

[4] The incidents surrounding Toran's employment with the Company occurred more than six months prior to the filing of the instant charges. The Board was, therefore,

(Continued)

Korchma's career with the Company closely followed the pattern established by Toran. Following his initial hire, Korchma too devoted his time to sitting in the Company's trailer or checking union membership cards (*supra*, p. 4). And even Korchma in his testimony admitted that after the Company rehired him in July 1973 he performed no truck-driving services of any sort but simply went "around on the job, checking the job," that sometimes the Company would ask his permission to use its own truck on the job, which he granted, and that beyond these chores he did nothing (A. 15; 214-216). For these tasks Korchma collected $20,000 from the Company in 1972, and as a result of his successful picketing in July 1973, Korchma was able to increase this figure by 50 cents an hour.

On this record there can be no doubt that the Board correctly found a violation of Section 8(b)(6). Indeed, the facts here fall squarely within the type of conduct described by Senator Taft and by the Supreme Court in *American Newspaper* and *Gamble Enterprises* as prohibited by the Section. Korchma, like his predecessor Toran, literally performed no services for the Company, or, at most, what the Court in *Gamble* referred to as "mere 'token' or nominal services." Nonetheless, Korchma and the Union insisted that the Company compensate Korchma at a rate in excess of $20,000 per year. All parties were, of course,

---

[4] (Continued) barred by Section 10(b) of the Act from making any findings of unfair labor practices with respect to them. It is well settled, however, that the Board may consider these incidents as relevant background evidence in assessing the lawfulness of the events within the 10(b) period that are in issue. See *Local Lodge No. 1424, IAM v. N.L.R.B.*, 362 U.S. 411, 416 (1960) ("earlier events may be utilized to shed light on the true character of matters occurring within the limitations period"). Accord: *N.L.R.B. v. Lundy Mfg. Co.*, 316 F.2d 921, 927 (C.A. 2, 1963), cert. denied, 375 U.S. 895; *N.L.R.B. v. National Shoes, Inc.*, 208 F.2d 688, 692 (C.A. 2, 1953).

aware at all times of the nature of Korchma's employment. Under these circumstances, the Union's demand for money for Korchma unquestionably amounts to, as the Board found (A. 20), "an exaction within the meaning of Section 8(b)(6)," and thus a violation of the Statute.

3. As stated, the Board's order here requires, *inter alia*, that the Union reimburse the Company for all wages paid to, and expenditures incurred in the employment of, Korchma after July 1, 1973 (A. 21). This remedy, which, as the Board stated (A. 21), is designed to restore the status quo, is plainly appropriate and well within the Board's broad discretion in such matters. See, e.g., *N.L.R.B. v. Revere Metal Art Co.*, 280 F.2d 96, 100-101 (C.A. 2, 1960), cert. denied, 364 U.S. 894. Nonetheless, the Union before the Board contended that a monetary remedy was not appropriate here because of the "dearth of cases involving Section 8(b)(6) . . . since the Supreme Court laid down the landmark cases in 1953. . . ." The Board properly rejected this argument. Although there may be few reported cases since the Supreme Court's decisions in 1953 in *American Newspaper* and *Gamble Enterprises*, there can be no question that the conduct involved here, as we have shown, is and always has been clearly illegal under the Statute as interpreted by the Board and the Supreme Court. Certainly, the Union cannot point to a single Board or court decision which suggests that the conduct found here would have been lawful. Under these circumstances there is no legal or equitable basis for withholding a reimbursement order here. See *H & F Binch Co. Plant of Native Laces v. N.L.R.B.*, 456 F.2d 357, 364-365 (C.A. 2, 1972).

CONCLUSION

For the reasons stated, it is respectfully submitted that judgment should be entered enforcing the Board's order in full.

JOHN D. BURGOYNE,
GRANT E. MORRIS,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

February 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Respondent, and J. R. STEVENSON CORP., Intervenor.	)	No. 74-2384 NO. 75-4001

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

John J. Sheehan, Esquire
51 Chambers Street
New York, New York 10007

Joel H. Golvensky, Esquire
Rains, Pogrebin & Scher
210 Old Country Road
Mineola, New York 11501

Elliott Moore

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 11th day of February, 1975